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February 9, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

Re: CC Docket 98-184

Dear Ms. Salas:

Enclosed for filing in the above captioned matter, please find an original and twelve (12) copies of Supplemental Comments of RCN Corporation and Motion For Leave To File Supplemental Comments.

Please acknowledge receipt by date-stamping the enclosed extra copy of this filing and returning it to me in the postage pre-paid envelope provided. If you have any questions regarding this filing please contact me at 202/424-7500.

Sincerely,

Robert V. Zener

Robert V. Zener

RVZ/ta
enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEB - 8 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
GTE CORPORATION, Transferor	)	
and	)	CC Docket 98-184
	)	
BELL ATLANTIC CORPORATION, Transferee	)	
	)	
Application for Consent to Transfer of Control	)	

SUPPLEMENTAL COMMENTS OF RCN CORPORATION

The purpose of these Supplemental Comments is to discuss the impact of the Supreme Court's recent decision in *AT&T Corporation v. Iowa Utilities Board*, 1999 WL 24568 (Jan. 25, 1999), on the request by Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") for approval of their proposed merger.

The Supreme Court's decision affects the merger, because it revives two Commission rules (requiring geographical deaveraging and TELRIC), which may significantly delay the approvals that Bell Atlantic is seeking under Section 271 of the Act in New York and other states. In addition, in response to the Supreme Court's ruling reinstating the Commission's interpretation of Section 252(i), Bell Atlantic has adopted a new policy that raises additional issues with respect to its applications for section 271 approval. Without these approvals, the claim that Bell Atlantic and GTE will engage in a strategy of significant out-of-region local competition -- which is the principal benefit they claim for the merger -- becomes meaningless, since that strategy depends on merged company's ability to include long-distance service in the bundled service package to be offered corporate customers. With the collapse of that strategy, the principal claimed benefit of the merger disappears.

1. The principal "pro-competitive benefit" which Bell Atlantic and GTE claim for the merger is that the merged company will "challenge the Big Three in the national provision of full-service telecommunications," thereby initiating a process that will lead to significant new competition in the local exchange market.[1] However, they concede that corporate customers will not buy "full-service telecommunications" unless the package includes long distance service.[2] Thus it is crucial for their case to show that Bell Atlantic may reasonably expect to obtain section 271 approval in most of its states before the merger is consummated, or soon thereafter.[3]

Bell Atlantic and GTE recognize the problem, but argue that Bell Atlantic is "well on its way to obtaining section 271 relief" – first in New York, and then "the vast majority" of the other of the states in the Bell Atlantic region before the merger is consummated, or shortly thereafter.[4]

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[1] Joint Reply of Bell Atlantic Corporation and GTE Corporation to Petitions to Deny and Comments, filed Dec. 23, 1998 ("Joint Reply"), at 2.

[2] Joint Reply at 6.

[3] GTE, of course, does not require section 271 approval. However, it is conceded that in order for the merged company to offer long-distance service in states within Bell Atlantic's current region – which includes states that are crucial for its claimed strategy – approval under section 271 will be required.

[4] Joint Reply at 13-15.

2. The Supreme Court's decision, however, introduces an additional factor in the approvals that Bell Atlantic is currently seeking under section 271 -- a factor that, as we shall describe, promises significant additional delay. The Supreme Court, reversing the Eighth Circuit, held that "the Commission has jurisdiction to design a pricing methodology." *Iowa Utilities*, *supra*, 1999 WL 24568 at *8. The result of that holding is to revive two Commission rules that bear significantly on the actions being taken by State Commissions on applications for interLATA authority under 271: the rule requiring TELRIC, 47 C.F.R. § 51.505, and the rule requiring state commissions to establish "at least three defined geographic areas within the state to reflect geographic cost differences." 47 C.F.R. § 51.505(f).

3. Bell Atlantic's application for Section 271 authority in New York raises significant issues under both geographical deaveraging and TELRIC, which are likely to cause substantial further delay.

First, Bell Atlantic has only two geographic rate zones for loops in the state of New York, despite the fact that the Commission's rules require a minimum of three such zones. 47 C.F.R. § 51.507(f). Until it has three rate zones for loops in New York, Bell Atlantic has not met Checklist item No. 2. *See* 47 U.S.C. § 271(c)(2)(B)(ii). The NYPSC currently has a proceeding underway to increase the degree of geographical deaveraging in New York, but the proceeding has just begin and will not result in an NYPSC order on deaveraging for at least another six months.

Bell Atlantic cannot argue that its failure to have three geographic rate zones in New York is not a serious enough violation of Commission rules to warrant delaying its Section 271 application. Currently, the densest zone in New York covers 69% of Bell Atlantic's service territory. That zone includes such disparate cities as Manhattan and Cheektowaga, a small town in upstate New York. The rates for a loop in Manhattan are significantly higher than the rates in the densest zones of such other states as Delaware, District of Columbia, Illinois, Maryland, Massachusetts, New Jersey, Ohio, Texas, Virginia, Washington, and Wisconsin — although Manhattan is one of the densest islands on the planet along with Hong Kong and Singapore.[5] The lack of a proper geographic deaveraging scheme in New York significantly hampers Bell Atlantic's competitors there.

Rule 507(f) requires three rate zones that "reflect geographic cost differences." 47 C.F.R. § 51.507(f). Before approving a third rate zone, the NYPSC must take evidence (as it is currently doing) regarding the basis for concluding that the new zone has "geographic cost differences" that distinguish it from the other two zones. Until the current process is complete

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[5]The following figures contrast the rates for 2-wire analog loops in the highest density zones in New York and other states.

New York	12.49
Delaware	10.07
District of Columbia	10.81
Illinois	3.72
Maryland	11.87
Massachusetts	7.54
New Jersey	11.95
Ohio	8.36
Texas	12.14
Virginia	9.52
Wisconsin	8.10

and a new record created to establish the cost basis for a third zone, Bell Atlantic's application in New York can go no further.[6] Bell Atlantic must wait for the regulatory process in New York to resolve geographical deaveraging issues.

Second, there is substantial reason to believe that the NYPSC set Bell Atlantic's loop rates by considering embedded costs, which the TELRIC rule specifically forbids states even to "consider[]" in the context of examining an incumbent LEC's TELRIC study. *See* 47 C.F.R. § 51.505(d)(1) ("The following factors *shall not be considered* in a calculation of the forward-looking economic cost of an element: . . . Embedded Costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts.") (emphasis in first sentence added). Numerous parties to the NYPSC's generic loop cost proceeding objected to Bell Atlantic's use of embedded cost information for the investment and expense components of its loop cost model. *See* NYPSC, *Opinion and Order Setting Rates for First Group of Network Elements*, Cases 95-C-0657, 94-C-0095, & 91-C-1174, Order No. 97-2 (April 1, 1997) ("*New York Order*"). The NYPSC ruled against the objecting parties, noting that it could consider "historical data" in setting loop rates:

> Another overstated criticism is that New York Telephone in effect conducted an embedded cost study because it took account of historical data. A forward-looking study attempts to portray the future system and estimate its incremental cost, but in doing so, it need not, and arguably should not, ignore the past and present. *Historical data, subjected to critical review, can provide the basis for forward-looking projections, and their use does not make the*

---

[6] At the most recent collaborative session on geographic deaveraging at the NYPSC last year, Bell Atlantic reported that it had not made substantial progress toward designing a cost model to deaverage a third rate zone. There is no reason to believe that the state of Bell Atlantic's progress on this issue has changed in any regard.

> *study an embedded one.* The key, of course, is that the historical data be critically evaluated, and, as described in the foregoing sections, some of New York Telephone's projections on the basis of historical data require substantial adjustment. But that means, as explained at the outset, that the important debate here is largely over inputs, not over study method. New York Telephone relies very heavily, perhaps to a fault, on historical or actual data (with respect, for example, to its network configuration or the expenses reflected in the CCFs); but that reliance does not mean it conducted an embedded study, and its effects can be limited, as we have done, by suitable adjustments to the inputs.

New York Order, at 118-119 (emphasis added).

The NYPSC's use of historical cost data raises significant issues under the TELRIC rule, which the Commission will now have to resolve when Bell Atlantic's 271 application is filed (unless Bell Atlantic revises its studies and the NYPSC makes a new finding).

An additional TELRIC problem is raised by Bell Atlantic's loop cost model in New York, in light of the TELRIC rule's requirement to use the "lowest cost network configuration" in TELRIC studies. *See* 47 C.F.R. § 51.505(b)(1). Bell Atlantic's cost study assumed that every loop, regardless of its length, used fiber optic cable for the feeder portion. The industry generally has considered fiber optic cable too expensive to be used for every loop, especially in a city such as Manhattan, where loop lengths are extraordinarily short. The industry has recommended using fiber optic cable only for loops that exceed a certain threshold, typically 12,000 feet. During the proceedings in New York, Bell Atlantic did not demonstrate, or even attempt to demonstrate, that an all-fiber-feeder construct represented the lowest cost network configuration.[7]

[7] Specifically, Bell Atlantic did not present evidence as to the costs of other network configurations to show that its preferred configured was the lowest cost. The only evidence on the record as to the cost of another network configuration came from AT&T, whose Hatfield model showed lower loop costs when assuming aggressively that only loops over 9,000

The short of the matter is that, given the revival of the TELRIC rule by the Supreme Court, the Commission will be faced with significant TELRIC issues if Bell Atlantic chooses to go forward with its application on the basis of the present record. For this reason, the Commission cannot accept Bell Atlantic's confident prediction of swift and sure approval – without which its claim that the merger will benefit the public loses its principal support.[8]

4. Further issues with respect to Bell Atlantic's checklist compliance in New York and its other states are raised by a policy Bell Atlantic recently announced in response to the Supreme Court's decision. Bell Atlantic has adopted the questionable practice of refusing to allow competitors to opt in to interconnection agreements that were approved by a state commission more than one year in the past. Moreover, Bell Atlantic starts the one-year clock running with the initial agreement that was used as the basis for subsequent opt-ins. As Bell Atlantic explains, "[i]n the case of an agreement that itself was an adoption of a previously existing agreement, the date upon which the previously existing agreement was approved by the state commission shall be the controlling date." (A copy of a recent letter from Bell Atlantic announcing this policy is attached as Exhibit A.)

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feet would use fiber in the feeder.

[8] It should be noted that if the Commission concludes that the data underlying rates in New York does not comply with TELRIC, application of the proxy rates (also revived by the Supreme Court's decision) will not rescue Bell Atlantic's 271 application. The statewide proxy rate for New York is $11.50, while the two present zone rates set for New York by the PSC are $12.49 and $19.24.

This recent announcement raises at least two issues with respect to checklist compliance.[9] Bell Atlantic relies on Rule 51.809(c), providing that "[i]ndividual interconnection, service, or network element arrangements shall remain available . . . for a reasonable period of time after the approved agreement is available for public inspection . . . " But that raises the issue of whether – in view of the careful distinction in the Commission's rules between "individual . . . arrangements" and the "agreement" in which such arrangements are "contained" (*see* § 51.809(a)) – the time limit allowed by the Commission rule applies to requests to opt in to entire agreements.

Another issue is whether Bell Atlantic's one-year limitation is "reasonable," particularly as applied retroactively with no prior warning, and with no showing that the technology or economics of loop interconnection has changed. Reasonableness must be assessed in light of the policy of section 252(i), which contemplated that the larger CLECs would incur the costs of negotiation and arbitration, with the smaller competitors opting in to their agreements. Our understanding is that in many Bell Atlantic states the larger competitors obtained their agreements during 1997, and subsequent competitors have used opt-ins. Bell Atlantic's newly-announced rule would, in this situation, mean that the clock has already run for smaller competitors -- raising a significant issue with respect to "reasonableness" under section 252(i) and rule 51.809(a), and casting further doubt on the claim that Bell Atlantic's 271 applications in *any* of its states are headed for swift and sure approval.

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9 Item 1 of the checklist requires interconnection in compliance with section 251(c)(2), which in turn requires compliance with section 252, including the option requirement of section 252(i).

CONCLUSION

Bell Atlantic's applications under Section 271 in New York and other states raise significant issues under Commission rules that were revived by the Supreme Court's *Iowa Utilities* decision. These issues cast doubt on the claim that these approvals will be obtained in the near future. Absent Section 271 approvals, the principal public interest benefit claimed for the merger disappears.

Respectfully submitted,

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February 9, 1999

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Room 1423
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Jennifer E. Van Scoter
Director, Negotiations and Policy
Telecom Industry Services

Bell Atlantic

February 2, 1999

Mr. Morton J. Posner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116

Re: Hyperion Telecommunications, Inc.

Dear Mr. Posner:

Bell Atlantic received your letter dated January 20, 1999 requesting adoption of the interconnection agreement between Brooks/New England Fiber and Bell Atlantic in Massachusetts. I am writing to inform you of a recent change that affects your request to adopt the interconnection agreement of another Competitive Local Exchange Carrier ("CLEC") under Section 252(i) of the Communications Act, 47 U.S.C. 252(i).

In its decision last week in *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court of the United States reinstated Section 51.809 of the FCC's rules, 47 CFR § 51.809, which had been invalidated by the U.S. Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997). As the Supreme Court observed, paragraph (c) of that rule "limits the amount of time during which negotiated agreements are open to requests" under Section 252(i).[1] Section 51.809(c) provides:

> Individual interconnection, service, or network element arrangements shall remain available for use by telecommunications carriers pursuant to this section *for a reasonable period of time* after the approved agreement is available for public inspection under section 252(f) of the Act.[2]

Pursuant to this FCC rule, newly reaffirmed by the Supreme Court, Bell Atlantic is adopting, effective immediately, a time limit on the availability of interconnection agreements under Section 252(i). No existing interconnection agreement (or portion thereof) will be available for adoption by another CLEC more than one year after the date the agreement was approved by the state commission. (In the case of an agreement that itself was an adoption of a previously existing agreement, the date upon which the previously existing agreement was approved by the state

[1] *AT&T Corp. v. Iowa Utilities Board*, slip op. At 29.
[2] 47 CFR 51.809(c)(emphasis added).

commission shall be the controlling date.) Accordingly, if the agreement you have sought to adopt was approved more than one year ago (or if the agreement you have sought to adopt itself is an adoption of an agreement that was approved more than one year ago), your request is hereby denied.

Bell Atlantic believes that the one year period we are adopting for existing agreements is more than the reasonable period of availability required by Section 51.809(c), in light of the continuous legal and technological changes affecting carrier interconnection arrangements. In adopting the "reasonable period" limitation, the FCC compared interconnection agreements to interexchange carrier contract tariffs, under which a negotiated service arrangement is made available to other customers during an "availability window" of only 90 days.

While Bell Atlantic's one-year availability policy is wholly reasonable and in accordance with applicable law, we nonetheless sincerely regret any inconvenience that may be caused by the implementation of this policy. We suggest two alternatives that will enable your company to get into business right away. You may, of course, utilize Section 252(i) to adopt an interconnection agreement between Bell Atlantic and another CLEC that was approved less than one year ago (so long as such agreement is itself not an adoption of another agreement that was approved by the state commission more than one year ago). A list of the available agreements for the jurisdiction you have requested is attached for your convenience. If you plan to continue this course of action, please notify me in writing of the agreement that you would like to adopt. Upon receipt of such notification and the completed Information Request Form, Ms. Robin Calcagno of my staff will undertake to prepare a short agreement for signature by the parties.

Alternatively, you may execute an interconnection agreement of your own with Bell Atlantic under Section 252(a) of the Act based on our current template, with a relatively short term (for example, six or nine months). This will enable you to get into business immediately, while you negotiate with Bell Atlantic a successor agreement or determine whether to pursue other options. If you would like to avail yourself of this approach, please provide in writing any comments you may have to our earlier contract proposal to me at the above address.

Finally, if you have any legal questions about Bell Atlantic's implementation of Rule 809(c) you may contact our counsel, John B. Messenger, on (617) 743-9026.

Very truly yours,

Jennifer Van Scoter

Jennifer Van Scoter

Attachment

Cc: John Messenger
Robin Calcagno

Bell Atlantic
Approved Interconnection Agreements

Massachusetts

COMPANY	TYPE	APPROVAL DATE
HarvardNet	Facilities-Based	9/10/98
MGC Communications	Facilities-Based	10/21/98
Dakota Services Limited	Facilities-Based	10/21/98
Teligent	Facilities-Based	10/21/98
Complete Business Systems	Facilities-Based	10/21/98
Omnipoint	Wireless	11/10/98
Broadband Communications	Facilities-Based	11/16/98
Cablevision Lightpath	Facilities-Based	12/1/98
Vitts	Facilities-Based	1/3/99
Norfolk County Internet	Facilities-Based	1/20/99
Network Access Solutions	Facilities-Based	1/26/99

This list is provided for convenience only, and Bell Atlantic does not warrant its accuracy or completeness. A CLEC's entitlement to a particular agreement (or portion thereof) under Section 252(i) and 47 CFR 51.809(c) will be determined with reference to the date the agreement was approved by the state commission. An interconnection agreement (or portion thereof) will not be available for adoption under Section 252(i) more than one year after it has been approved. In the case of an agreement that itself was an adoption of a previously existing agreement, the date upon which the previously existing agreement was approved by the state commission shall be the controlling date.

Revised: 2/4/98

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
GTE CORPORATION,	)	
Transferor	)	
and	)	CC Docket 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee	)	
	)	
Application for Consent to Transfer of Control	)	
	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMMENTS

RCN Corporation hereby moves for leave to file the attached Supplemental Comments. The purpose of these Supplemental Comments is to discuss the impact of the Supreme Court's decision in *AT&T Corporation v. Iowa Utilities Board*, 1999 WL 24568 (Jan. 25, 1999), on the claimed public interest benefits of the proposed merger. The Supreme Court's decision was handed down January 25, 1999, after the closing date for filing Reply Comments on the proposed merger. In that circumstance, acceptance of Supplemental Comments is appropriate.

Amendment of Section 2.106 of the Commission's Rules To Allocate Spectrum at 2 GHZ for Use by the Mobile-Satellite Service, 12 FCC Rcd 7388, ¶ 9 (1997).

Respectfully submitted,

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February 9, 1999

268805.1

CERTIFICATE OF SERVICE

I, Teri Lee Amaya, hereby certify that on February 9, 1999, a true copy of Supplemental Comments of RCN Corporation and Motion For Leave To File Supplemental Comments was served on the following people via United States Postal Service first-class mail, postage pre-paid:

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*Indicates hand delivery.